

Submission to Joint Standing Committee on Migration: An inquiry into the review processes associated with visa cancellations made on criminal grounds

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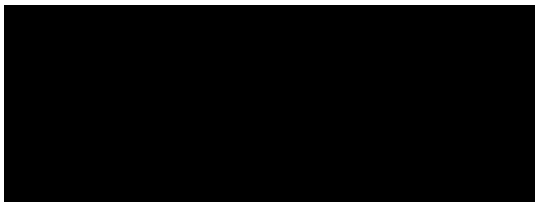
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**Submission by Assistant Professor Narelle Bedford to the Joint Standing Committee
on Migration on *Review processes associated with visa cancellations made on
criminal grounds.***

13 June 2018



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Summary of major points:

1. Merits review as performed by the Administrative Appeals Tribunal (AAT) is extremely important. The AAT is an integral part of the Australian administrative justice system. Merits review provides a mechanism of review that is simultaneously accessible, and also fair, just, informal, economical and quick. The AAT has a central role in upholding accountability over government decision-making. It is part of our system of checks and balances. The AAT is itself subject to the checks and balances of the court system.
2. Statistics need to be treated with respect, and not subject to over-simplification. The rate that the AAT substitutes decisions of the government in respect of visa cancellations for criminal matters is not high and not significantly different to rates in other matters.
3. Decisions about visa cancellations on criminal grounds are 'undeniably complex' as it involves the balancing of competing evidence and factors.
4. The integrity, accountability, and transparency provided by AAT oversight on visa cancellations made on criminal grounds, performs a vital role and the AAT review process should be supported to continue to remain in place and defended from unwarranted negative reporting.

Introductory comments

1. I welcome the opportunity to make a submission to Joint Standing Committee on Migration on review processes associated with visa cancellations made on criminal grounds. I thank the Committee and its Secretariat for the extension of time for this submission to be lodged after the closing date.
2. This submission is intended to be made public.
3. I am currently an Assistant Professor in the Faculty of Law at Bond University, where I research and teach in the field of administrative law. Therefore, I have professional expertise in the subject matter of this inquiry. My comments and recommendations below are based on my expertise in administrative law issues.
4. This submission is in respect of the first item listed in the Terms of Reference, namely 'The efficiency of existing review processes as they relate to decisions made under section 501 of the Migration Act'.

Generally about merits review

5. I wish to commence this submission by stressing the importance of merits review as part of the Australian administrative justice system. Merits review provides a mechanism of review that is simultaneously accessible, and also fair, just, informal, economical and quick. The AAT has a central role in upholding accountability over government decision-making. It is part of our system of checks and balances. The AAT is itself subject to the checks and balances of the court system.
6. Further, it is crucial to acknowledge the value of the AAT as an independent forum. The AAT facilitates access to justice by conducting merits review of government decisions and thereby permitting ordinary people to have their voice heard as their matter is reviewed by an independent, expert body. The availability of independent review increases public confidence in government decision-making, as by being subject to scrutiny it shows the government's commitment to transparency.
7. Merits review was designed to have a normative impact on public administration and decision-making. This means that the AAT has a broader role beyond conducting individual reviews. One benefit of the AAT reviewing government decisions is that it provides guidance to decision-makers on interpretation of statutes and the application of policies to facts, which will in turn lead to improved government decision-making in the future.

Generally about the review process for visa cancellation

8. Government decision-making is best viewed as a continuum. It commences with the original decision-maker, usually the Department or Minister, then there may be an internal review mechanism, followed by the AAT and the courts. When considering the review of visa cancellations, it is necessary to consider the whole decision-making process.
9. The framework and process of reviewing visa cancellation decisions has been well explained in the submissions made by the AAT (submission 22) and also the Department of Home Affairs (submission 29). I do not seek to repeat these submissions where they explain this system.
10. I support the approach taken by the Australian National Audit Office (submission 23) in identifying those aspects of the decision-making continuum which could be improved at the departmental level. The earlier that relevant information is obtained in the decision-making continuum, the better the whole system, including reviews by the AAT, can operate.
11. It is essential that the AAT not be the target of criticisms that more accurately may have their sources earlier in the decision-making continuum. It may be that credible information only becomes available at a certain point in the review process. This scenario could arise because the AAT is able to consider new information - in addition to that information which was before the original decision-maker. The ability to consider fresh evidence enables a holistic and individualised approach to decision-making.

Efficiency of the review process

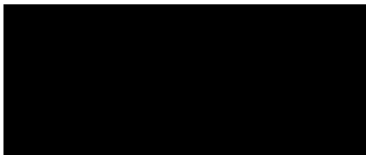
12. Statistics need to be treated with respect, and not subject to over-simplification. The rate at which the AAT overturns government decisions needs to be considered carefully. It is essential that the data be analysed appropriately. The rate that the AAT substitutes decisions of the government in respect of visa cancellations for criminal matters is not high and not significantly different to rates in other matters.
13. The AAT submission records in paragraph [15] that the AAT had 166 applications for review of visa decisions on criminal grounds from 1 July 2017 until 31 March 2018. At Appendix A the AAT records that 95 of 170 such decisions were affirmed. This means that the AAT agreed with the original decision. A further 37 were disposed of for other reasons. This totals 132 decisions where the original decision was upheld – in percentage terms 78%. In comparison 38 decisions, or 22%, were varied/set aside by the AAT.
14. To the extent that decisions are over-turned this may be explicable on the basis of new evidence or the comprehensive application of the factors contained in the *Ministerial Direction*.

How the review process operates

15. There has been some mis-reporting in the media and in other public comments on what is to be taken into account as part of the visa cancellation review process. The AAT's role is to apply the legislation (specifically section 501 of the *Migration Act*) as well as the factors contained in *Ministerial Direction No. 65*, issued by the Minister under section 499 of the *Migration Act 1958* (Cth).
16. It is incorrect to characterise the policy contained in the *Ministerial Direction* as a 'one strike and you are out' situation. In fact, the *Ministerial Direction* is much more detailed and nuanced and lists many factors to be balanced against each other.
17. I would like to cite an example of a very recent AAT decision which exemplifies the points raised in this submission. The matter of *Trikilis and Minister for Immigration and Border Protection* (Migration) [2017] AATA 1409 (6 September 2017) is illustrative of the continuum of decision-making and the impact that delays at one point in the decision-making process can have. At paragraph [105] the AAT records that there was 'considerable delay in the processing of Mr Application while Australia's security organisations conducted the necessary security checks'.
18. The Ministerial Direction in clause 8(2) makes explicit reference to 'evidence from independent and authoritative sources.' In *Trikilis* the AAT noted at paragraph [54] that there was 'unchallenged evidence' and further gave 'significant weight to the fact that the Minister did not challenge Mr ... on any aspect of his evidence'. The AAT explained at paragraph [55] that 'there was independent corroboration of his evidence', this referring to evidence provided from the United States Department of State and Amnesty International. Therefore the AAT decided the matter in strict accordance with the requirements of clause 8(2) of the *Ministerial Direction*.
19. Unfortunately media reporting of this AAT decision was highly critical with headlines such as "Tribunal overturns government on visa for criminal" in the Australian and 'AAT overturns more criminal visa decisions' in the Herald Sun. The articles in both instances do not refer to the requirements contained in the Ministerial Directions nor the analysis of the evidence available to the AAT.
20. The AAT has been unfairly maligned in the media and other public comments. It is important that the Joint Standing Committee give unequivocal support to the AAT and the role it performs as an accessible and transparent mechanism of review that provides accountability over government decision-making, as part of a broader continuum of oversight.

Concluding comments

21. As noted in submission 19 by the Victorian Legal Aid, these decisions which involve the balancing of competing evidence and factors are 'undeniably complex'. This is because the legislation is complex, there is Ministerial policy to be also applied and individualised attention to the particular evidence in each matter is required. This is similarly the case in taxation matters and those decisions are subject to review by the AAT. The integrity, accountability, and transparency provided by AAT oversight over visa cancellations made on criminal grounds performs a vital role and the review process should be supported through continuing to remain in place and defended from unwarranted negative reporting.



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